



U.S. Copyright Office

37 CFR Parts 201 and 205

[Docket No. 2023-1]

Ex Parte Communications

AGENCY: U.S. Copyright Office, Library of Congress.

ACTION: Notice of proposed rulemaking.

SUMMARY: The U.S. Copyright Office is issuing a notice of proposed rulemaking to establish procedures governing the use of *ex parte* communications in informal rulemakings. The proposed rule defines *ex parte* communications, instructs the public on how to request an *ex parte* meeting with the Office, sets forth the responsibilities of parties after an *ex parte* meeting, and identifies impermissible *ex parte* communications.

DATES: Comments on the proposed rule must be made in writing and received by the U.S. Copyright Office no later than 11:59 PM Eastern Time on [INSERT DATE 45 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: For reasons of Government efficiency, the Copyright Office is using the *regulations.gov* system for the submission and posting of public comments in this proceeding. All comments are therefore to be submitted electronically through *regulations.gov*. Specific instructions for submitting comments are available on the Copyright Office website at <https://copyright.gov/rulemaking/ex-parte-communications>. If electronic submission of comments is not feasible due to lack of access to a computer or the internet, please contact the Office using the contact information below for special instructions.

FOR FURTHER INFORMATION CONTACT: Rhea Efthimiadis, Assistant to the General Counsel, by email at meft@copyright.gov, or by telephone at 202-707-8350 or

Melinda Kern, Attorney-Advisor, by email at mkern@copyright.gov, or by telephone at 202–707–8350.

SUPPLEMENTARY INFORMATION:

I. Background

Statutory Background

The Copyright Office conducts rulemakings consistent with the Administrative Procedure Act (“APA”) rules governing informal rulemakings.¹ An informal rulemaking includes a notice-and-comment period, which gives the public an opportunity to respond to an agency’s proposed regulatory action. Unlike formal rulemakings, informal rulemakings do not require on-the-record hearings or trial-type procedures,² such as the presentation of evidence.

While the APA sets forth certain requirements for informal rulemakings,³ it does not prohibit agencies from engaging in what are commonly referred to as “*ex parte* communications.”⁴ The term “*ex parte*” is a bit of a misnomer in this context. In other legal contexts, the term means “[o]n or from one party only, usually without notice to or argument from the adverse party,”⁵ and usually refers to communications with a court by one party. In the rulemaking context, an *ex parte* communication is a “[w]ritten or oral communication[] regarding the substance of an anticipated or ongoing rulemaking between . . . agency personnel and interested persons; and that are not placed in the

¹ See 5 U.S.C. 553; 17 U.S.C. 701(e).

² See 5 U.S.C. 556, 557 (discussing procedural requirements in formal rulemakings).

³ *Id.* at 553.

⁴ See *Home Box Off., Inc. v. FCC*, 567 F.2d 9, 57 (D.C. Cir. 1977) (finding *ex parte* communications in informal rulemakings “completely appropriate” when they “do not frustrate judicial review or raise serious questions of fairness”); *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 524 (1978) (noting that under the APA, “[a]gencies are free to grant additional procedural rights in the exercise of their discretion”); see also *Sierra Club v. Costle*, 657 F.2d 298, 401–02 (D.C. Cir. 1981) (noting that Congress declined to extend the *ex parte* prohibition applicable to formal rulemakings to informal rulemakings despite being urged to do so); cf. 5 U.S.C. 557(d) (prohibiting *ex parte* communications in formal rulemaking proceedings).

⁵ Black’s Law Dictionary (11th ed. 2019).

rulemaking docket at the time they occur.”⁶ As informal rulemakings are not adversarial proceedings, there is normally no “adverse party.”

Office’s Prior Handling of Ex Parte Communications in Rulemakings

In the past, the Office has engaged in a limited number of *ex parte* communications with interested parties to discuss targeted issues related to the merits of a rulemaking. For example, in response to stakeholder requests, the Office provided interested parties the opportunity to engage in *ex parte* communications during the seventh and eighth triennial section 1201 rulemaking.⁷ It offered interested parties this opportunity in certain other rulemakings, including those pertaining to royalty reporting practices under section 111 and those implementing the Orrin G. Hatch-Bob Goodlatte Music Modernization Act and the Copyright Alternative in Small-Claims Enforcement (“CASE”) Act of 2020.⁸

In each of these circumstances, the Office communicated the availability of *ex parte* meetings in a *Federal Register* notice and posted more detailed instructions regarding the *ex parte* meeting process on the associated rulemaking’s webpage.⁹

⁶ 79 FR 35988, 35993 (June 25, 2014) (reflecting Administrative Conference of the United States Recommendation 2014–4, “Ex Parte” Communications in Informal Rulemaking).

⁷ 82 FR 49550, 49563 (Oct. 26, 2017); U.S. Copyright Office, *Section 1201 Rulemaking: Seventh Triennial Proceeding to Determine Exceptions to the Prohibition on Circumvention, Recommendation of the Acting Register of Copyrights* 20–21 (2018); see U.S. Copyright Office, *Section 1201 of Title 17* 150–51 (2017) (documenting stakeholder desire for informal communications with the Office); U.S. Copyright Office, *Ex Parte Communications*, <https://www.copyright.gov/1201/2021/ex-parte-communications.html> (last visited Feb. 9, 2023) (*ex parte* guidelines for the Eighth Triennial Section 1201 Proceeding, 2021).

⁸ U.S. Copyright Office, *Ex Parte Communications*, <https://www.copyright.gov/music-modernization/related-rulemakings.html> (last visited Feb. 9, 2023) (identifying *ex parte* guidelines for certain MMA rulemakings and reflecting over eighty *ex parte* letter summaries); U.S. Copyright Office, *Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020 Rulemakings*, <https://www.copyright.gov/about/small-claims/related-rulemakings.html> (last visited Feb. 9, 2023) (identifying *ex parte* guidelines for CASE Act rulemakings).

⁹ See, e.g., 86 FR 16156, 16158 (Mar. 26, 2021) (identifying guidelines for *ex parte* communication pertaining to CASE Act rulemakings); 85 FR 65293, 65310 (Oct. 15, 2020) (identifying guidelines for *ex parte* communications in the Office’s Eighth Triennial Section 1201 Proceeding, 2021); 84 FR 49966, 49968 (Sept. 24, 2019) (identifying guidelines for *ex parte* communication for implementing the MMA’s blanket license); 83 FR 65747, 65753–54 (Dec. 21, 2018) (identifying guidelines for *ex parte* communications in MLC and DLC designation

Generally, the Office required parties to submit a request identifying the names of all proposed attendees and the party or parties on whose behalf each attendee is appearing, and following the meeting, to generate a written summary of the discussion for the rulemaking record.¹⁰

Administrative Conference of the United States Recommendations

Although not every agency has a regulation governing *ex parte* communications, the Administrative Conference of the United States (“ACUS”), an independent federal agency “whose statutory mission is to identify ways to improve the procedures by which federal agencies protect the public interest and determine the rights, privileges, and obligations of private persons,”¹¹ recommends that each agency that conducts informal rulemakings should adopt such a policy.¹² ACUS also gives direction on “how agencies can best manage *ex parte* communications in the context of informal rulemaking proceedings,” including how agency personnel should respond to requests to engage in *ex parte* communications; what qualifies as an *ex parte* communication (*i.e.*, substantive vs.

proceeding); 82 FR 58153, 58154 (Dec. 11, 2017) (identifying guidelines for *ex parte* communication pertaining to proposed amendments to royalty reporting practices under section 111); *see also* U.S. Copyright Office, *Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020 Rulemakings*, <https://www.copyright.gov/about/small-claims/related-rulemakings.html> (last visited Feb. 9, 2023); U.S. Copyright Office, *Ex Parte Communications*, <https://www.copyright.gov/1201/2021/ex-parte-communications.html> (last visited Feb. 9, 2023) (identifying *ex parte* guidelines for the Eighth Triennial Section 1201 Proceeding, 2021); U.S. Copyright Office, *Ex Parte Communications*, <https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html> (last visited Feb. 9, 2023) (identifying *ex parte* guidelines for the MMA’s blanket license implementation); U.S. Copyright Office, *Ex Parte Communications*, <https://www.copyright.gov/rulemaking/mma-designations/ex-parte-communications.html> (last visited Feb. 9, 2023) (identifying *ex parte* guidelines for MLC and DLC designation rulemaking); U.S. Copyright Office, *Ex Parte Communications*, <https://www.copyright.gov/rulemaking/section111/ex-parte-communications.html> (last visited Feb. 9, 2023) (identifying *ex parte* guidelines for proposed amendments to regulations governing cable, satellite, and DART license reporting practices).

¹⁰ On occasion, the Office proactively offered rulemaking participants opportunities to engage in *ex parte* meetings. For example, following the Office’s “Statutory Cable, Satellite, and DART License Reporting Practices” notice of proposed rulemaking, 82 FR 56926 (Dec. 1, 2017), the Office offered to meet with earlier rulemaking participants to update the rulemaking record.

¹¹ *About ACUS*, Administrative Conference of the United States, <https://www.acus.gov/about-acus> (last visited Feb. 9, 2023).

¹² 79 FR 35988, 35994.

non-substantive inquiries); and the appropriate procedures to ensure that *ex parte* communications and their corresponding letters are made available to the public as part of the rulemaking docket.¹³ Further, ACUS has made suggestions on the following subjects: (i) the manner in which *ex parte* communications between an agency and informal rulemaking parties should be disclosed on the rulemaking docket; (ii) the requirements that *ex parte* meeting parties file a letter with the Office that summarizes the meetings; and (iii) how *ex parte* communications provided post-deadline or containing new documentary materials are treated by the agency.¹⁴

II. Proposed Rule

The Office is proposing new regulations to memorialize its practices regarding *ex parte* communications in informal rulemakings, as well as additional guidance for parties seeking to engage in such communications. It has used the ACUS's recommendations and other agencies' comparable rules¹⁵ as guidance in proposing its regulatory text.

In proposing this rule, the Office recognizes that *ex parte* communications benefit the agency by informing it of stakeholders' positions while fostering a complete and transparent rulemaking record. *Ex parte* communications may help provide a complete regulatory record in several ways. First, the communications may "facilitate a more candid and potentially interactive dialogue of key issues," such as questions about facts or law.¹⁶ Parties may also wish to share sensitive information with the Office through an *ex parte* meeting rather than a public comment, which "may be an indispensable avenue . . . to obtain the information necessary to develop sound, workable policies."¹⁷

¹³ *Id.* ACUS previously discussed the benefits of *ex parte* communications and opined that agencies should not generally prohibit such communications. 42 FR 54251, 54253 (Oct. 5, 1977).

¹⁴ 79 FR 35988, 35995.

¹⁵ *See, e.g.*, 83 FR 9222 (Mar. 5, 2018) (Surface Transportation Board final rule); 76 FR 24376 (May 2, 2011) (FCC's final rule); 74 FR 52795 (Oct. 14, 2009) (Department of Energy's notice of guidance on *ex parte* communications).

¹⁶ 79 FR 35988, 35994.

¹⁷ *Id.*

Additionally, when rulemaking parties submit written comments, questions may arise that require further correspondence between the submitter and the Office. As the Office has previously stated, *ex parte* communications “are intended to provide an opportunity for participants to clarify evidence and/or arguments made in prior written submissions and to respond to questions from the Office on those matters.”¹⁸ These communications allow the Office to supplement, but do not substitute for, the pre-existing regulatory record and help ensure it has all the information necessary to build out a complete record.

The purpose of this rule is to make information about the Office’s *ex parte* communication process broadly available to ensure procedural fairness to the public and rulemaking parties. Rather than following the past practice of providing formal notice to request *ex parte* communications in specific rulemakings, the proposed rule will make these communications available more generally across its rulemakings. This will allow the public and rulemaking parties more opportunities to inform the Office on complex legal, factual, or technical issues that may arise during a rulemaking proceeding. The rule also contemplates that *ex parte* communications will aid in efficient rulemaking proceedings by allowing rulemaking parties to respond to late-breaking issues. For these reasons, the Office is proposing and inviting public comments on the following rule.

Applicability

The proposed rule would apply to both written and oral communications between the Office and rulemaking parties that deal with substantive issues in ongoing

¹⁸ U.S. Copyright Office, *Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020 Rulemakings: Ex Parte Communications*, <https://www.copyright.gov/about/small-claims/related-rulemakings.html> (last visited Feb. 9, 2023); *see also, e.g.*, U.S. Copyright Office, *Ex Parte Communications*, <https://www.copyright.gov/1201/2021/ex-parte-communications.html> (last visited Feb. 9, 2023) (providing *ex parte* communications’ guidelines for the Eighth Triennial Section 1201 Proceeding, 2021); U.S. Copyright Office, *Ex Parte Communications*, <https://www.copyright.gov/rulemaking/mma-designations/ex-parte-communications.html> (last visited Feb. 9, 2023) (identifying *ex parte* guidelines for MLC and DLC designation rulemaking).

rulemakings. Allowing both written and oral communications ensures that all methods of communication are covered to provide the greatest level of access by rulemaking parties.

The proposed rule, however, does not apply to communications relating to non-substantive issues (*e.g.*, questions about the Copyright Office’s procedures or a rulemaking’s status). Non-substantive issues would not normally influence an agency’s decision-making, inhibit transparency, or be unfair to other interested parties. If, however, a communication contains both non-substantive and substantive issues, the Office will require the parties to submit a summary of the substantive issues discussed to be included as part of the rulemaking record.

The proposed rule does not apply to communications to the Office on substantive issues prior to the publication of a *Federal Register* notice regarding the same issues. Such communications may be beneficial in helping the Office “gather essential information, craft better regulatory proposals, and promote consensus building among interested persons.”¹⁹ The rule also does not apply to communications made by Congress, Federal departments and agencies, the Judiciary, or foreign, state, or local governments.²⁰ The Office has occasionally received such communications in rulemakings, which have been included in the rulemaking record, even if submitted after the written comment period has closed.²¹ Finally, the proposed rule does not apply to communications required by law.

¹⁹ 79 FR 35988, 35994 (reflecting ACUS recommendation and citing Memorandum on Regulatory Reform, 31 Weekly Comp. Pres. Doc. 363 (Mar. 4, 1995), <https://www.govinfo.gov/content/pkg/WCPD-1995-03-13/pdf/WCPD-1995-03-13-Pg363.pdf> (directing agencies to “review all . . . administrative *ex parte* rules and eliminate any that restrict communication prior to the publication of a proposed rule—other than rules requiring the simple disclosure of the time, place, purpose, and participants of meetings”)).

²⁰ The Office notes that the ACUS’s recommendation did “does not address unique issues that may arise in connection with communications between agencies and members of Congress, foreign governments, or state and local governments.” *Id.*

²¹ See, *e.g.*, U.S. Copyright Office, *Section 1201 Rulemaking: Sixth Triennial Proceeding to Determine Exemptions to the Prohibition on Circumvention, Recommendation of the Register of Copyrights* 23 (2015), <https://cdn.loc.gov/copyright/1201/2015/registers-recommendation.pdf>

The Office will not require comments made on its website or social media pages (e.g., the Office’s blog, Twitter page, etc.) to comply with this proposed rule. While such communications could arguably fall within the proposed definition of “*ex parte* communication,” the Office’s regulatory team does not monitor these pages for substantive issues related to ongoing rulemakings. Moreover, these comments will not be considered as part of the rulemaking record. Parties who wish to submit comments into the rulemaking record must comply with instructions included in a proposed rule’s *Federal Register* notice.

Meeting Requests, Format, and Written Summary

The proposed rule sets forth the requirements for parties who wish to request an *ex parte* meeting, for how those meetings will be conducted, and the timing and substance of the written summary that must be submitted after the meeting for the rulemaking record. Under the rule, all requests for *ex parte* meetings normally must be submitted by email. The Office understands, however, that all parties may not have the same resources or ability to file a request by email and allows them to contact the Office for special instructions if requesting a meeting by email is not feasible.

All meeting requests must be sent to either the Office employee(s) whose contact information is listed in the *Federal Register* for the document that the party wishes to discuss or to the Assistant to the Office’s General Counsel. The Office believes that having requests sent to these specified individual(s) will dissuade rulemaking parties from trying to engage in unauthorized *ex parte* communications through other Office employees. Moreover, an *ex parte* meeting request must identify the names of all proposed attendees, the name of the party on whose behalf each attendee is appearing, and the rulemaking that will be discussed in the meeting. Providing this information helps

(reflecting inclusion of letter submitted by the California Air Resources Board into the rulemaking record).

the Office understand what interests and arguments may be discussed and enables it to efficiently arrange meeting dates and times.

The proposed rule also provides information on permissible formats for *ex parte* meetings. To ensure the greatest possible public access, the proposed rule allows meetings to be held in-person, telephonically, virtually (*e.g.*, using Zoom, Microsoft Teams, or similar online platforms), or through some hybrid combination of these formats. Allowing participation through various formats provides all rulemaking parties with the same opportunity to engage in discussions with the Office and furthers the Office's goal of providing a fair rulemaking process. While parties' preferences regarding the format will be considered, the Office will make the final decision regarding the appropriate format for each *ex parte* meeting.²²

The proposed rule also makes clear that joint *ex parte* meetings are permitted. Rulemaking parties with similar or differing interests may appear together in meetings with the Office. This can help make the rulemaking process more efficient and promote more open dialogue on unresolved issues, for example by providing meeting parties with an opportunity to reach an agreement or consensus on an outstanding issue.

To ensure impartiality to all rulemaking parties, the proposed rule limits what information may be presented in *ex parte* meetings. Similar to the Office's previous practices and guidelines on *ex parte* communications,²³ the submission of new

²² For example, the Office may pause or restrict the availability of in-person meetings due to circumstances that effect public health and safety (*e.g.*, the COVID-19 pandemic) or based on the availability of Office employees.

²³ See, *e.g.*, U.S. Copyright Office, *Copyright Alternative in Small-Claims Enforcement (CASE) Act of 2020 Rulemakings*, <https://www.copyright.gov/about/small-claims/related-rulemakings.html> (last visited Feb. 9, 2023) (*ex parte* guidelines for CASE Act rulemakings); U.S. Copyright Office, *Ex Parte Communications*, <https://www.copyright.gov/1201/2021/ex-parte-communications.html> (last visited Feb. 9, 2023) (*ex parte* guidelines for the Eighth Triennial Section 1201 Proceeding, 2021); U.S. Copyright Office, *Ex Parte Communications*, <https://www.copyright.gov/rulemaking/mma-implementation/ex-parte-communications.html> (last visited Feb. 9, 2023) (*ex parte* guidelines for the MMA's blanket license implementation); U.S. Copyright Office, *Ex Parte Communications*, <https://www.copyright.gov/rulemaking/mma->

documentary materials that are outside of a rulemaking record is not allowed. The Office will not consider or accept these materials without separate prior written approval.

The proposed rule requires that parties participating in *ex parte* meetings provide the Office with a written summary of the meeting. The written summary must be submitted by email to either the Office employee(s) whose contact information is listed in the corresponding *Federal Register* document or the Assistant to the General Counsel. If email submission is not feasible, the parties may contact the Office for special instructions regarding the submission process. To ensure prompt and effective disclosure of *ex parte* meetings, the proposed rule requires the summaries to be submitted within two business days of the meeting (unless otherwise directed or agreed to by the Copyright Office), to contain the same information that is required for the meeting request, and to summarize the arguments made by the party participating in the *ex parte* communication and the substantive views it expressed in the meeting.

To provide sufficient transparency to the other rulemaking parties and the public, the summary must include enough detail that a non-participating party would understand the substance of the meeting and the issues raised. The Office will not accept or consider summaries that merely list the subject(s) discussed or provide a one- or two-sentence description. If a summary does not comply with these requirements, or contains inaccuracies (*e.g.*, missing attendees, information omitted or characterized incorrectly), the Office will require a corrected letter, which must be submitted within two business days of the Office's notification. If a party does not provide a corrected letter, the Office may make a notation on the rulemaking's designated webpage noting or describing the

designations/ex-parte-communications.html (last visited Feb. 9, 2023) (*ex parte* guidelines for MLC and DLC designation rulemaking); U.S. Copyright Office, *Ex Parte Communications*, <https://www.copyright.gov/rulemaking/section111/ex-parte-communications.html> (last visited Feb. 9, 2023) (*ex parte* guidelines for proposed amendments to regulations governing cable, satellite, and DART license reporting practices).

deficiency. The Office also may, in its discretion, decline to consider the non-compliant letter as part of the rulemaking record.

The proposed rule allows multiple parties to submit a joint summary, if desired. It is the responsibility of the party submitting the summary to ensure that all other meeting parties agree to its viewpoints and contents. If the multiple parties represent conflicting viewpoints, the Office will require each party to submit a separate summary.

These safeguards will bolster the rulemaking process's transparency and offer fairness to rulemaking parties. The summaries not only provide the public with information regarding the parties engaging in *ex parte* meetings and the topics discussed, but also provide an adequate, written record of the meetings that the Office may rely on in its decision-making process. Additionally, the meeting summaries should impose a minimal burden on parties, as these procedures have been used without difficulty in past rulemakings.

The proposed rule also permits the Office to impose deadlines on *ex parte* communications in any particular rulemaking. These deadlines may be separate from deadlines to submit written comments. *Ex parte* communications, including submission of additional written materials or *ex parte* meeting requests, made after an imposed deadline normally will be denied by the Office. The Office understands, however, that imposing such restrictions may prevent it from establishing a comprehensive rulemaking record. For this reason, the rule contains limited exceptions, including in circumstances where additional comments are requested by the Office, the comments consist of non-substantive visual aids, or inclusion of the comments in the rulemaking record would be in the interests of justice or fairness (*e.g.*, allowing post-deadline comments to respond to a significant, new, and relevant legal precedent).

Impermissible Communications and Their Effect

The proposed rule sets forth a process to address attempts to circumvent the *ex parte* communications rules. If a party attempts to engage in an *ex parte* communication to an Office employee outside of the process described above, the employee must take certain steps. First, they must attempt to prevent the communication. If the employee is unable to prevent the communication, they must advise the person making the communication that it will not be considered part of the rulemaking record. Additionally, they must deliver a copy of the communication, or if it was delivered orally, draft and deliver a summary of the communication to the Office's General Counsel.

The consequence for parties that engage, or attempt to engage, in an impermissible *ex parte* communication will be that the communication will not be considered as part of the rulemaking record. While other agencies have chosen to impose harsher sanctions or penalties on parties that engage in impermissible *ex parte* communications,²⁴ at this time the Office believes that its proposed rule provides enough of a deterrent and further penalties are not necessary. The Office, however, is open to

²⁴ See, e.g., 12 CFR 1081.110(d) (requiring a party that engages in impermissible *ex parte* communication in adjudicatory proceedings before the Consumer Financial Protection Bureau “to show cause why the party’s claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation” and allowing Director or hearing officer “to the extent not prohibited by law, [to] censure, suspend, or revoke the privilege to practice before the Bureau of any person who makes, or solicits the making of, an unauthorized *ex parte* communication”); 16 CFR 1025.68(g) (subjecting Consumer Product Safety Commission rulemaking participants to “any appropriate sanction or sanctions, including but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication”); 24 CFR 180.215(c) (identifying similar sanctions found within the Department of Housing and Urban Development hearings on civil rights matters); 40 CFR 304.25(d) (requiring that a party who engages in impermissible *ex parte* communication before the Environmental Protection Agency for certain arbitration procedures to “show cause why that party’s arguments or claim should not be denied, disregarded, or otherwise adversely affected on account of such violation”); 47 CFR 1.1216(d) (identifying that parties that violate the Federal Communications Commission *ex parte* communication guidelines “may be subject to admonishment, monetary forfeiture, or to having his or her claim or interest in the proceeding dismissed, denied, disregarded, or otherwise adversely affected,” but that “such alternative or additional sanctions as may be appropriate also may be imposed”); 49 CFR 1102.2(f) (permitting Surface Transportation Board to “censure, suspend, or revoke the privilege of practicing before the agency of any person who knowingly and willfully engages in or solicits prohibited *ex parte* communication.”); 82 FR 18687, 18690 (Apr. 21, 2017) (“Persons who fail to adhere to this policy [regarding *ex parte* presentations in rulemaking proceedings before Consumer Financial Protection Bureau] are subject to such sanctions as may be appropriate.”).

considering comments on what types of sanctions, if any, should be deemed appropriate with respect to different types of *ex parte* violations and the agency’s authority to impose them.

List of Subjects

37 CFR Part 201

Copyright, General provisions.

37 CFR Part 205

Copyright, Legal processes.

Proposed Regulations

For the reasons set forth in the preamble, the U.S. Copyright Office proposes amending 37 CFR parts 201 and 205 as follows:

PART 201—GENERAL PROVISIONS

1. The authority citation for part 201 continues to read as follows:

Authority: 17 U.S.C. 702.

2. Amend § 201.1 by adding paragraph (d) to read as follows:

§ 201.1 Communication with the Copyright Office.

* * * * *

(d) *Requests for an ex parte meeting.* The rules governing *ex parte* communications in informal rulemakings, including methods to request *ex parte* meetings, are found in 37 CFR 205.24.

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PART 205—LEGAL PROCESSES

3. The authority citation for part 205 continues to read as follows:

Authority: 17 U.S.C. 702.

4. Add subpart D, consisting of § 205.24, to read as follows:

Subpart D—*Ex Parte* Communications

Sec.

205.24 *Ex Parte* communications in informal rulemakings.

§ 205.24 *Ex Parte* communications in informal rulemakings.

(a) *General.* The rules governing *ex parte* communications in informal rulemakings are intended to provide an opportunity for rulemaking parties to clarify evidence or arguments made in prior written submissions, to respond to assertions or requests made by other parties, or to respond to questions from the Copyright Office on any of those matters.

(b) *Applicability.* (1) An *ex parte* communication is a written or oral communication regarding the substance of an ongoing rulemaking between a Copyright Office employee and a member of the public that must be included in the rulemaking record, as described in this section.

(2) An *ex parte* communication does not include the following:

- (i) Communications made prior to the publication of a proposed rule or non-substantive inquiries, such as those regarding the status of a rulemaking or the Copyright Office's procedures;
- (ii) Communications made by members of Congress, Federal departments and agencies, the Judiciary, foreign governments, or state and local governments; or
- (iii) Communications required by law.

(3) To the extent that communications made on Copyright Office webpages, including social media pages, would be considered *ex parte* communications under paragraph (b)(1) of this section, such communications are not subject to the rules described in this section and will not be considered as part of the rulemaking record.

(c) *Process.* (1) *Submitting an ex parte meeting request.*

(i) A party may request an in-person, telephonic, virtual, or hybrid *ex parte* meeting to discuss aspects of a notification of inquiry, notice of public hearing, proposed rule, or final rule by submitting a written request to either—

(A) The Copyright Office employee listed as the contact for further information in the *Federal Register* for the notification of inquiry, notice of public hearing, proposed rule, or final rule that the party wishes to discuss; or

(B) The Copyright Office’s Assistant to the General Counsel. The current contact information for this employee can be obtained by contacting the Copyright Office.

(ii) The Copyright Office permits *ex parte* meetings in informal rulemakings at its discretion. When *ex parte* meetings are permitted, the Office will determine the most appropriate format (*e.g.*, in-person, telephonic, virtual, or hybrid) for each meeting, but will consider the requesting party’s preferences in making that determination.

(iii) The request should be submitted by email. If email submission of an *ex parte* meeting request is not feasible, a party may contact the Copyright Office for special instructions.

(2) *Ex parte meeting request content.* An *ex parte* meeting request must identify the following information:

(i) The names of all proposed attendees;

(ii) The party or parties on whose behalf each attendee is appearing; and

(iii) The rulemaking that will be discussed.

(3) *Ex parte meeting summary.*

(i)(A) Unless otherwise directed by the Copyright Office, within two business days after an *ex parte* meeting, attendees must email the Copyright Office employee identified in paragraph (c)(1)(i)(A) or (B) of this section a letter

detailing the information identified in paragraph (c)(2) of this section and summarizing the meeting's discussion. The letter must summarize the substance of the views expressed and arguments made at the meeting in such a way that a non-participating party would understand the scope of issues discussed. Merely listing the subjects discussed or providing a short description will not be sufficient. If email submission of the letter is not feasible, an attendee may contact the Copyright Office for special instructions.

(B) Meeting attendees representing different groups may submit a joint summary letter, but if the groups represent conflicting viewpoints, the groups must submit separate summary letters.

(C) If a party's *ex parte* meeting summary letter does not comply with paragraph (c)(3)(i) of this section or contains inaccuracies, the Copyright Office shall notify the *ex parte* meeting attendee and request a corrected letter. Unless otherwise directed by the Copyright Office, the attendee must submit the corrected letter within two business days of receiving such notification from the Office.

(D) If the *ex parte* meeting attendee does not provide a corrected letter under paragraph (c)(3)(i)(C) of this section, the Copyright Office may add a notation on its website noting or describing the deficiency. The Copyright Office may also, in its discretion, decline to consider the noncompliant letter as part of the rulemaking record.

(d) *Publication of ex parte communications.* *Ex parte* meeting letters and comments will be made publicly available on the Copyright Office's website.

(e) *Impermissible communications.* (1) *General; attempts to circumvent the ex parte communication process.* If a party attempts to make an *ex parte* communication outside of the process described in paragraph (c) of this section to a Copyright Office employee,

the employee shall attempt to prevent the communication. If unsuccessful in preventing the communication, the employee shall advise the person making the communication that it will not be considered by the Copyright Office as a part of the rulemaking record and shall deliver either a copy of the communication or, if the communication was made orally, a summary of the communication to the Copyright Office's General Counsel and Associate Register of Copyrights.

(2) *Other impermissible communications.*

(i) *Post-deadline communications.* The Copyright Office may impose a deadline to make *ex parte* meeting requests or to submit written comments for a rulemaking. Parties normally may not make requests after that deadline has passed, unless the deadline is removed by the Copyright Office or until after a final rule is published in the *Federal Register* for that rulemaking.

(ii) *New documentary material.*

(A) The Copyright Office generally will not consider or accept new documentary materials once the rulemaking record has closed.

(B) The restriction in this paragraph does not apply to any Copyright Office requests, *e.g.*, requests for supporting legal authority or additional documentary evidence.

(C) The restriction in this paragraph does not apply to non-substantive visual aids used in an *ex parte* meeting that are not otherwise submitted by a party as part of the rulemaking record. The Copyright Office, in its discretion, may include a copy of the visual aid in the rulemaking record.

(f) *Effect of impermissible ex parte communication.* No prohibited *ex parte* communication shall be considered as part of the rulemaking record, unless it has been introduced into the rulemaking record through a permitted method. In the interests of justice or fairness, the Copyright Office may waive this restriction.

Dated: February 14, 2023.

Suzanne Wilson,

General Counsel and

Associate Register of Copyrights

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